COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH COUNTY

APPEALS COURT NO.
2018-P-0012

COMMONWEALTH,
Appellant

VS.

RICHARD GARDNER,
Appellee

ON APPEAL FROM JUDGMENTS OF
THE BROCKTON SUPERIOR COURT

BRIEF FOR THE COMMONWEALTH

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February 12, 2018

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ISSUE PRESENTED

I. Whether it was error to dismiss a petition alleging that Richard Gardner is a sexually dangerous person where he is a "prisoner" as required under the statute, albeit not a Massachusetts prisoner?

STATEMENT OF THE CASE

The Commonwealth filed a petition on June 14, 2017 alleging that Richard Gardner is a sexually dangerous person. Brockton Superior Court No. 1783CV00628. G. L. c. 123A. See Impounded Appendix at 3 to 43. See A. 3-10. As outlined, the petition followed from these circumstances.

Gardner pleaded guilty to one count of Kidnapping and one count of Rape of a Child (twelve-year-old John B., see facts, next section). He was sentenced to ten to fifteen (10-15) years in prison to be served from and after several offenses he had committed against children in Rhode Island. See Plymouth Superior Court Docket 84854-85855.

While on bail for his attack on John B. in Hingham, MA, Gardner went to Rhode Island in a stolen motor vehicle and assaulted three boys, Thomas S. (10 years old), Michael S. (10 years old), and Adam G. (6 years old), over the course of a few weeks. Gardner

committed further crimes against Adam G. in Hingham Massachusetts.

For his Rhode Island crimes against Thomas S., Michael S., and Adam G., on May 12, 1989, Gardner was found guilty, after a jury trial, of three counts of Kidnapping, one count of First Degree Child Molestation, one count of Second Degree Child Molestation, one count of Assault with a Dangerous Weapon, one count of Burglary, one count of Possession of Stolen Motor Vehicle, one count of Eluding Police, one count of Possession of a Weapon, and one count of Assault and Battery. Kent Superior Court Docket K1-1988-0565.

Gardner was sentenced to one hundred and ninety years (190) on his eleven felony convictions. However, on March 18, 2004, Rhode Island vacated this original sentence. Gardner was re-sentenced to fifty (50) years in state prison with twenty (20) years to serve and the balance of said sentence suspended for thirty (30) years.

Based on his crimes against Adam G. in Massachusetts to which he confessed, Gardner pleaded guilty at the Brockton Superior Court on August 2, 1988 to Indecent Assault and Battery on a Child Under

14 and Kidnapping. Plymouth Superior Court Docket 87310-87311. He was sentenced to seven and one-half to ten years in state prison to be served from and after his Rhode Island sentences.

In 2004, Gardner was released from the Rhode Island Department of Correction to the custody of the Massachusetts Department of Correction to serve his pending Massachusetts sentences. Gardner served his Massachusetts sentences, and on October 5, 2016, Gardner was released from Massachusetts to Rhode Island to begin his pending thirty (30) year Rhode Island probationary sentence.

Gardner is a resident of Massachusetts, accordingly his probation was transferred to Norfolk County Superior Court for supervision.

On October 16, 2016, eleven days later, Gardner was arrested by the Quincy Massachusetts Police Department for violation of the conditions of his probation. He was transferred back to Rhode Island where he was found in violation of his probation. Rhode Island sentenced him to one year in prison.

Gardner was transferred to Massachusetts pursuant to the New England Corrections Compact to serve his Rhode Island sentence in Massachusetts.

On June 14, 2017 the Commonwealth filed a Petition for Civil Commitment of a Sexually Dangerous Person Pursuant to G. L. c. 123A. A. 14.

Dr. Mark Schaefer of Psychological Consulting Services, LLC, reviewed Gardner and opined that he was sexually dangerous.

After hearing on July 10, 2017, at the Brockton Superior Court, Gildea, J. found probable cause to believe that the respondent is sexually dangerous. The Court committed the respondent to the Massachusetts Treatment Center for evaluation by two qualified examiners for a period not to exceed sixty days. A. 15.

The qualified examiners, Dr. Gregg Belle and Dr. Katrin Rouse Weir, timely filed their reports and opined that the respondent is a sexually dangerous person. A. 15.

The Commonwealth moved for trial on August 25, 2017. A. 15.

Gardner moved to dismiss the petition claiming that (1) the District Attorney lacked jurisdiction to file the petition because he was not serving a "Massachusetts sentence" when it was filed, and (2) the Rhode Island process that led to his transfer to

prison in Massachusetts violated Rhode Island procedures and rules under the New England Corrections Compact.[1] A. 16. Impounded Appendix at 44-67.

On November 24, 2017, Gardner's motion to dismiss was allowed in a written decision By Judge Gilday. He interpreted the statute to mean that Gardner had to be serving a "Massachusetts sentence." He did not reach the second issue. A. 3, 18.

The Commonwealth timely appealed. A. 20. Gardner is being held at the treatment center pending resolution of this appeal.

STATEMENT OF THE FACTS/ ALLEGATIONS[2]

In 1987 to 1988, Richard Gardner kidnapped and molested four young boys, ages six to twelve, in truly frightening and disturbing circumstances, in the

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[1] The New England Corrections Compact specifies that any claims under it must be brought in the sending state (Rhode Island). Gardner received a hearing in Rhode Island. He was required to bring any claims concerning that hearing in Rhode Island, but failed to do so. R.I. Gen. Laws. §13-11-2 (Art. 5 (a)) (RI decision conclusive and unreviewable in receiving state). Massachusetts does not have jurisdiction to review Rhode Island's administration of its side of the Compact.

[2] The facts/ allegations are recited by the motion judge in his memorandum of decision and order on the motion to dismiss the petition, A. 3-10, and set forth in the petition and attached materials (see Impounded Appendix, 3-43). They are undisputed at this point in the proceedings.

course of a two-state crime spree (Massachusetts and Rhode Island). Massachusetts was Gardner's base of operations.

On October 31, 1987 Gardner sexually assaulted twelve (12) year old John B. at the Wompatuck State Park in Hingham, MA. John B. was with his family and had become separated from them.

Gardner took John B. further into the park, blind folded him, and made him lay on the ground. Gardner then touched the boy's genitals and buttocks and placed the boy's penis in his mouth. Gardner heard the boy's family calling and let him go. The boy disclosed the incident to his family and reported the events to the Hingham Police. Sketches of the boy's attacker were released.

A few days after the incident, Gardner went to the church where the boy's father was a preacher and confessed to the parents. Gardner was arrested, admitted to the offenses, charged with the crimes, and released on bail.

For these offenses, Gardner pleaded guilty to one count of Kidnapping and one count of Rape of a Child. He was sentenced to ten to fifteen (10-15) years in prison to be served from and after several offenses he

had committed against children in Rhode Island. (See Plymouth Superior Court Docket 84854-85855).

While on bail for his attack on John B. (12 years old) in Hingham, MA, Gardner went to Rhode Island in a stolen motor vehicle and assaulted three boys, Thomas S. (10 years old), Michael S. (10 years old), and Adam G. (6 years old), over the course of a few weeks. Gardner committed further crimes against Adam G. in Hingham Massachusetts.

Thomas S. On June 18, 1988, Gardner drove from Massachusetts to Providence Rhode Island where he abducted ten (10) year old Thomas S. Gardner threw the boy into his car; took him to a secluded place; fondled him; and sucked his penis.

Michael S. On July 29, 1988, Gardner went back to Rhode Island. At about 5:45 A.M. Gardner broke into a home in Warwick by climbing through a window. He had a knife and a flashlight. Gardner forced ten (10) year old Michael S. to go through the window and walk to his car. Gardner drove Michael S. to a wooded area, made him get out of the vehicle and take off his pajama bottoms. Gardner fondled the boy and performed oral sex on the boy. After approximately an hour, the

respondent drove Michael S. back to the area of his home and let him go.

Adam G. Later that very same day, Gardner came across a group of boys on their bikes near a library in Warwick. He abducted six (6) year old Adam G. from his bike and threw him in his car.

Gardner drove six-year-old Adam G. to a park in Hingham, Massachusetts. Gardner tied Adam G. to a tree and left him there for a few hours. Gardner returned at some point later in the night and stayed at the location with the boy. Gardner indecently touched the boy before returning him to his home in Rhode Island later in the day on July 30, 1988.

The respondent was apprehended by Warwick Police after a chase on July 30, 1988.

For his Rhode Island crimes against Thomas S., Michael S., and Adam G., on May 12, 1989, Gardner was found guilty, after a jury trial, of three counts of Kidnapping, one count of First Degree Child Molestation, one count of Second Degree Child Molestation, one count of Assault with a Dangerous Weapon, one count of Burglary, one count of Possession of Stolen Motor Vehicle, one count of Eluding Police, one count of Possession of a Weapon, and one count of

Assault and Battery, (See Kent Superior Court Docket K1-1988-0565).

Gardner was sentenced to one hundred and ninety years (190) on his eleven felony convictions. However, on March 18, 2004, Rhode Island vacated this original sentence. Gardner was re-sentenced to fifty (50) years in state prison with twenty (20) years to serve and the balance of said sentence suspended for thirty (30) years.

Based on his crimes against Adam G. in Massachusetts to which he confessed, Gardner pleaded guilty at the Brockton Superior Court on August 2, 1988 to Indecent Assault and Battery on a Child Under 14 and Kidnapping. (See Plymouth Superior Court Docket 87310-87311). He was sentenced to seven and one-half to ten years in state prison to be served from and after his Rhode Island sentences.

ARGUMENT

I. GARDNER IS A "PRISONER," THEREFORE THERE IS JURISDICTION TO PROCEED AGAINST HIM AS A SEXUALLY DANGEROUS PERSON.

The motion judge dismissed the petition on the ground that the District Attorney lacked jurisdiction to file it because Gardner was not serving a "Massachusetts" sentence when it was filed. However,

to reach that result, contrary to established law, the motion judge reached far beyond the plain words of the statute, and rewrote it by inserting the word "Massachusetts" into the statute where the Legislature chose not to include it. The motion judge proceeded to interpret the statute "narrowly," (albeit by adding a word), and by failing to consider and balance the Legislature's remedial purposes, including the provision of treatment to those requiring it, in enacting the statute. See A. 3-10.

The starting point in analysis is the plain language of the statute. Commonwealth v. Welch, 444 Mass. 80, 85 (2005), further citation omitted. Settled law teaches that "the primary source of insight into the intent of the Legislature is the language of the statute. Where, as here, the language of a statute is clear and unambiguous, it is conclusive as to the intent of the Legislature." Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 60-61 (2002), internal citations and quotations omitted ("Where the ordinary meaning of the statutory terms yields a workable result, we need not resort to extrinsic aids of interpretation such as legislative history").

The pertinent section of the statute, G. L. c. 123A, §12,[3] reads as follows.

> (b) When the district attorney or the attorney general determines that the prisoner . . . is likely to be a sexually dangerous person as defined in section 1, the district attorney or the attorney general at the request of the district attorney may file a petition alleging that the prisoner . . . is a sexually dangerous person and stating sufficient facts to support such allegation in the superior court where the prisoner . . . is committed or in the superior court of the county where the sexual offense occurred.

In Massachusetts, "prisoner" is defined for all purposes as: "(m) "prisoner", a committed offender and such other person as is placed in custody in a correctional facility in accordance with law." G. L. c. 127, § 1 (Specifying that "As used in this chapter and elsewhere in the general laws, unless the context otherwise requires, the following words shall have the

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[3] Section (a) governs notice to the district attorney and attorney general. It reads in part: "Any agency with jurisdiction of a person who has ever been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense as defined in section 1, regardless of the reason for the current incarceration, confinement or commitment, . . . shall notify in writing the district attorney of the county where the offense occurred and the attorney general six months . . . In such notice, the agency with jurisdiction shall also identify those prisoners or youths who have a particularly

following meanings. . . "). A correctional facility is "(d) "correctional facility", any building, enclosure, space or structure used for the custody, control and rehabilitation of committed offenders and of such other persons as may be placed in custody therein in accordance with law."

Gardner fits squarely within the terms of the statute - he is a "prisoner" - "a committed offender and such other person as is placed in custody in a correctional facility in accordance with law." G. L. c. 127, § 1(m). The District Attorney properly filed the petition against Gardner in the Superior Court where he committed his crimes.

Here, the words of the statute are plain, and are entitled to be enforced without further examination. The Legislature defined "prisoner" for all purposes, and then used that word as a term of art in the SDP statute, G. L. c. 123A, § 12. The Legislature was not required to use any terminology other than the very word it already defined to explain what it meant by "prisoner." TO be sure, the word alone sufficed.

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high likelihood of meeting the criteria for a sexually dangerous person."

This interpretation gives full force and effect to the requirement that: "All the words of a statute are to be given their ordinary and usual meaning, and each clause or phrase is to be construed with reference to every other clause or phrase without giving undue emphasis to any one group of words, so that, if reasonably possible, all parts shall be construed as consistent with each other so as to form a harmonious enactment effectual to accomplish its manifest purpose." Commonwealth v. Chamberlin, 473 Mass. 653, 660 (2016), further citation omitted.

The case law lends further support. In Commonwealth v. Ballard, (AC 17-P-411) (Feb 2, 2018) at 11, the court construed "prisoner" in its ordinary sense and concluded that an SDP commitment was valid if commenced before the termination of a period of criminal confinement. Id., citing Commonwealth v. Gillis, 448 Mass. 354, 359 (2007).

There was no need for the motion judge to look beyond the plain words the Legislature provided to ascertain its intent. Even so, the Legislature stated its intended purpose -- the statute was enacted to provide "for the care, custody, treatment and rehabilitation of persons adjudicated as being

sexually dangerous." G. L. c. 123A, § 2. Thus, the abiding purpose of the statute is to provide as many people as possible with treatment.

Even valid concerns of the court about deprivation of liberty cannot wholly abrogate the statute's essential purpose. The statute should not be read so narrowly as to exclude from its umbrella those that plainly fit within its remedial goals. See Commonwealth v. Ballard, supra at 10 (Recognizing the statutes twin goals, and explaining that a narrow reading does not mean "excluding as many incarcerated persons as possible"). See, e.g., Commonwealth v. Gillis, supra at 357, quoting Commonwealth v. Beck, 187 Mass. 15, 17 (1904) (Laws in derogation of liberty or general rights of the citizen are to be strictly construed); Commonwealth v. Libby, 472 Mass. 93, 96-97 (2015) (Narrowly construing the SDP statute, as with other statutes in derogation of liberty, not only helps avoid possible constitutional due process problems . . . but also helps ensure that individuals are not deprived of liberty without a clear statement of legislative intent to do so).

The court laid too great an emphasis on narrowly reading the statute to the exclusion of its

overarching purpose, and more importantly to exclusion of the simple enforcement of its plain words. The court ignored that other sections which include a requirement of a probable cause determination, and a finding of sexual dangerousness beyond a reasonable doubt adequately give scope to "narrowness" protecting liberty interests.

To effectuate the "narrowness" the court believed was generally compelled, the court inserted the word "Massachusetts" into the statute beside the term "prisoner" in G. L. c. 123A, § 12(b). This ruling runs afoul of established law directing that language should not be implied where it is not present. See, e.g., Ciardi v. F. Hoffmann-La Roche, Ltd., 436 Mass. 53, 62-63 (2002), citing Commonwealth v. Galvin, 388 Mass. 326, 330 (1983) ("where the Legislature has employed specific language in one paragraph, but not in another, the language should not be implied where it is not present").

That the Legislature meant this statute to have a broad reach, to effectuate its goal of treatment, is illustrated by its inclusion of crimes committed in other jurisdictions for consideration in the determination of whether someone is sexually

dangerous. The Legislature never restricted the statute to the bounds of "Massachusetts" alone, nor showed the intent to do so. Commonwealth v. Welch, 444 Mass. 80, 85 (2005), further citation omitted (A statute is to be interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated").

CONCLUSION

For the above stated reasons, or any others the court finds just and appropriate, this court should reverse the allowance of the motion to dismiss.

Respectfully submitted,

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Dated: February 12, 2018

COMMONWEALTH'S ADDENDUM

Part I ADMINISTRATION OF THE GOVERNMENT

Title XVII PUBLIC WELFARE

Chapter 123A CARE, TREATMENT AND REHABILITATION OF SEXUALLY DANGEROUS PERSONS

Section 2 NEMANSKET CORRECTIONAL CENTER; TREATMENT AND REHABILITATION PERSONNEL

Section 2. The commissioner of correction shall maintain subject to the jurisdiction of the department of correction a treatment program or branch thereof at a correctional institution for the care, custody, treatment and rehabilitation of persons adjudicated as being sexually dangerous. Said facility shall be known as the "Nemansket Correctional Center". The commissioner of correction shall appoint a chief administrative officer who shall have responsibility for providing personnel with respect to the treatment and rehabilitation of the sexually dangerous persons, consistent with public safety. The commissioner of correction shall have the authority to promulgate regulations consistent with the provisions of this chapter.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XVII PUBLIC WELFARE

Chapter 123A CARE, TREATMENT AND REHABILITATION OF SEXUALLY DANGEROUS PERSONS

Section 12 NOTIFICATION OF PERSONS ADJUDICATED AS DELINQUENT JUVENILE OR YOUTHFUL OFFENDER BY REASON OF A SEXUAL OFFENSE; PETITIONS FOR CLASSIFICATION AS SEXUALLY DANGEROUS PERSON; HEARINGS

Section 12. (a) Any agency with jurisdiction of a person who has ever been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense as defined in section 1, regardless of the reason for the current incarceration, confinement or commitment, or who has been charged with such offense but has been found incompetent to stand trial, or who has been charged with any offense, is currently incompetent to stand trial and has previously been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense, shall notify in writing the district attorney of the county where the offense occurred and the attorney general six months

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prior to the release of such person, except that in the case of a person who is returned to prison for no more than six months as a result of a revocation of parole or who is committed for no more than six months, such notice shall be given as soon as practicable following such person's admission to prison. In such notice, the agency with jurisdiction shall also identify those prisoners or youths who have a particularly high likelihood of meeting the criteria for a sexually dangerous person.

(b) When the district attorney or the attorney general determines that the prisoner or youth in the custody of the department of youth services is likely to be a sexually dangerous person as defined in section 1, the district attorney or the attorney general at the request of the district attorney may file a petition alleging that the prisoner or youth is a sexually dangerous person and stating sufficient facts to support such allegation in the superior court where the prisoner or youth is committed or in the superior court of the county where the sexual offense occurred.

(c) Upon the filing of a petition under this section, the court in which the petition was filed shall determine whether probable cause exists to believe that the person named in the petition is a sexually dangerous person. Such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause.

(d) At the probable cause hearing, the person named in the petition shall have the following rights:

(1) to be represented by counsel;

(2) to present evidence on such person's behalf;

(3) to cross-examine witnesses who testify against such person; and

(4) to view and copy all petitions and reports in the court file.

(e) If the person named in the petition is scheduled to be released from jail, house of correction, prison or a facility of the department of youth services at any time prior to the court's probable cause determination, the court, upon a sufficient showing based on the evidence before the court at that time, may temporarily commit such person to the treatment center pending disposition of the petition. The person named in the petition may move the court for relief from such temporary commitment at any time prior to the probable cause determination.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XVIII PRISONS, IMPRISONMENT, PAROLES AND PARDONS

Chapter 127 OFFICERS AND INMATES OF PENAL AND REFORMATORY INSTITUTIONS. PAROLES AND PARDONS

Section 1 DEFINITIONS

Section 1. As used in this chapter, the following words shall, unless the context clearly requires otherwise, have the following meanings:?

"Commissioner", the commissioner of correction.

"Parole board", the parole board of the department of correction.

"Qualified mental health professional", a treatment provider who is a psychiatrist, psychologist, psychiatric social worker or psychiatric nurse and others who by virtue of education, credentials and experience are permitted by law to evaluate and care for the mental health needs of patients.

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"Residential treatment unit", a general population housing unit within a correctional institution of the commonwealth that is operated for the purpose of providing treatment and rehabilitation for inmates with mental illness.

"Secure treatment unit", a maximum security residential treatment program designed to provide an alternative to segregation for inmates diagnosed with serious mental illness in accordance with clinical standards adopted by the department of correction.

"Victim", a person who has suffered a personal injury, including mental anguish or death, property damage or property loss; also any entity which has suffered property damage or property loss as a direct result of the crime for which the sentence referred to in this chapter was imposed.

11-24-17

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

COMMONWEALTH

vs.

RICHARD GARDNER

MEMORANDUM OF DECISION AND ORDER ON MOTION TO DISMISS CH. 123A PETITION

The Commonwealth has filed a petition against Richard Gardner ("Gardner") to civilly commit him as a sexually dangerous person ("SDP") pursuant to General Laws Chapter 123A. Gardner now moves to dismiss the petition on the ground that he was not serving a Massachusetts sentence when the petition was filed. For the reasons discussed below, the motion to dismiss the petition is **ALLOWED**.

BACKGROUND

On October 31, 1987, Gardner saw a twelve year old boy alone at Wompatuck State Park in Hingham, blindfolded him and made him lie on the ground, then touched the boy's genitals and placed the boy's penis in his mouth. Gardner released the boy when he heard the boy's family calling him. Gardner was arrested and charged in Brockton Superior Court with kidnapping and rape of a child. He then was released on bail.

While free on bail, Gardner traveled to Rhode Island in a stolen motor vehicle and assaulted three boys over the course of a few weeks. On June 18, 1988, Gardner abducted a ten year old boy in Providence, drove him to a secluded area, fondled him, and sucked his penis. On July 29, Gardner returned to Warwick, Rhode Island, climbed through the window of a house, and forced a ten year old boy at knife point through the window and into his car. He

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CC: PM
JB
11-24-17

drove to a wooded area where he fondled the boy and performed oral sex on him, then drove him home. The same day, Gardner abducted a six year old boy riding a bicycle in Warwick and threw him into the car. Gardner drove to Hingham, Massachusetts and tied the boy to a tree. He indecently assaulted the boy and then returned him to his home in Rhode Island the next day.

On May 31, 1989, Gardner was found guilty in Kent County, Rhode Island of three counts of kidnaping, one count of first degree child molestation, one count of second degree child molestation, one count of assault with a dangerous weapon, one count of burglary, one count of possession of a stolen motor vehicle, one count of eluding police, one count of possession of a weapon, and one count of assault and battery. Originally, Gardner was sentenced to 190 years in prison. However, in November of 1992, his convictions were reversed and in 1993, he pled guilty to the charges and was sentenced to 50 years, with 30 years to serve and the balance suspended. See Commonwealth v. Gardner, 56 Mass. App. Ct. 31, 32, rev. den., 438 Mass. 1103 (2002).

On April 7, 2004, Gardner was released from the Rhode Island Department of Correction to the custody of the Massachusetts Department of Correction to serve a Massachusetts sentence for kidnaping and rape of a child arising from the October 31, 1987 Hingham incident. He had pled guilty to those charges in August of 1989 and received a 10 to 15 year sentence. In addition, on May 9, 1991, Gardner pled guilty to indecent assault and battery on a child under 14 and kidnaping arising from the July 29, 1998 Hingham incident, and received a 7.5 to 10 year sentence to follow the Rhode Island sentence. Gardner served these Massachusetts sentences at MCI - Cedar Junction.

On October 3, 2016, Gardner was released from his Massachusetts sentence to begin his probationary sentence in Rhode Island. The Plymouth County District Attorney was notified of Gardner's impending release but failed to petition to have him civilly committed pursuant to Chapter 123A. Because Gardner is a Massachusetts resident, his probation was transferred to Norfolk County for supervision. On October 16, Gardner was arrested for entering the Quincy Public Library in violation of a local bylaw relating to sex offenders. He then was transferred back to Rhode Island for a probation violation. Gardner began serving a one year sentence on the probation violation at the ACI in Cranston, Rhode Island. He intended to live with his fiancee, Patricia Warner, in Providence when released.

On May 10, 2017, with only eight weeks left on his sentence, Gardner received a Notice of Hearing for Involuntary Transfer. On May 15, he was informed that he would be moved to Massachusetts. On June 13, Gardner was transferred to Massachusetts involuntarily under the New England Interstate Corrections Compact and incarcerated at NCCI-Gardner, with a scheduled release date of July 13, 2017. On June 14, the Plymouth County District Attorney filed a petition to commit him as an SDP pursuant to Chapter 123A. On June 19, this Court entered an order of temporary commitment pursuant to G.L. c. 123A, § 12. On July 10, this Court found probable cause to commit Gardner to the Massachusetts Treatment Center for sixty days pursuant to G.L. c. 123A, § 13.

DISCUSSION

Gardner argues that the District Attorney lacked jurisdiction to file an SDP petition against him because he was not serving a Massachusetts sentence on June 14, 2017. Chapter 123A, section 12(b) provides in relevant part:

> When the district attorney . . . determine[s] that the prisoner . . . is likely to be a sexually dangerous person as defined in section 1, the district attorney . . . may file a petition alleging that the prisoner is a sexually dangerous person . . .

The question is whether Gardner was a "prisoner" within the meaning of this statute. See Commonwealth v. DeWeldon, 80 Mass. App. Ct. 626, 626, rev. den., 461 Mass. 1103 (2011) (Commonwealth may file SDP petition only if defendant is lawful prisoner at time of filing).

In determining eligibility for civil commitment, the fact of lawful custody alone is not determinative, nor is it enough that an individual is serving a sentence. Coffin v. Superintendent, Massachusetts Treatment Cntr., 458 Mass. 186, 189 (2010). Thus, for example, a person held in custody while serving a sentence imposed under a facially unconstitutional statute is not a "prisoner" against whom an SDP petition may be filed. Id. Further, a person in custody solely because of a clerical error in calculaing good time credits is not serving a valid sentence and is not a "prisoner" under Chapter 123A. Commonwealth v. Allen, 73 Mass. App. Ct. 862, 864, rev. den., 454 Mass. 1101 (2009). Finally, a person who is held in custody awaiting trial because he could not afford bail is not a "prisoner" for purposes of the statute. Commonwealth v. Libby, 472 Mass. 93, 100 (2015).

Here, at the time the District Attorney filed the petition, Gardner was lawfully in custody serving a valid sentence for a criminal conviction in Rhode Island. Nonetheless, he argues that

the Commonwealth lacks jurisdiction to commit him because he was not serving a Massachusetts sentence. The Commonwealth concedes that Gardner's transfer to Massachusetts under the New England Interstate Corrections Compact did not transform his Rhode Island probation sentence into a Massachusetts sentence. Cf. Commonwealth v. Copson, 2015 WL 8188545 at *1 (Mass. App. Ct. Rule 1:28) (defendant was not entitled to good time credits for Federal probation violation even though he served part of that time in Massachusetts custody). Neither the case law nor the available legislative history sheds light on whether the Legislature intended to permit the civil commitment of a defendant serving an out of state sentence.

The Commonwealth contends that even if Gardner had not been transferred to Massachusetts and served the remainder of his sentence in Rhode Island, it would have jurisdiction to file an SDP petition against him because he committed a sex offense in Massachusetts. In support, the Commonwealth notes that G.L. c. 123A, § 12(b) authorizes the filing of a petition in either the county where the prisoner is incarcerated or the county where the sex offense occurred. In effect, the Commonwealth's position is that Chapter 123A confers the authority to file a petition against a prisoner serving an out of state sentence anywhere in the country, as long as he committed a sex offense in the Commonwealth at some point in the past.[1] This Court cannot agree.

[1]The District Attorney represented at oral argument that she is not aware of any other case in which her office has filed an SDP petition against a prisoner serving a non-Massachusetts sentence.

The Commonwealth emphasizes that the Legislature amended Chapter 123A in 2004 to expand its reach to prisoners who have committed a past sex offense "regardless of the reason for the current incarceration, confinement or commitment." See Libby, 472 Mass. at 97-98. In addition, the Commonwealth notes that § 1 defines "sexual offense" to include not only enumerated Massachusetts crimes but also "a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority." Accordingly, the Commonwealth argues, § 12(b) should be interpreted broadly to protect public safety by authorizing the filing of an SDP petition against prisoners in any state serving a non-Massachusetts sentence as long as they have committed a past sex offense in Massachusetts.

However, Chapter 123A is a statute in derogation of liberty, which the Supreme Judicial Court has emphasized must be interpreted narrowly. See Libby, 472 Mass. at 96; Coffin v. Superintendent, Massachusetts Treatment Cntr., 458 Mass. at 189. Given the due process concerns with civil commitment, the court will not subject a class of persons to the SDP statute without a clear statement of legislative intent to do so. Coffin v. Superintendent, Massachusetts Treatment Cntr., 458 Mass. at 189. See, e.g., Commonwealth v. Gillis, 448 Mass. 354, 359 (2007) (person who is civilly committed and faces no criminal charges is not "prisoner" under Chapter 123A). In the view of this Court, legislative permission to file SDP petitions against prisoners currently serving sentences for non-sexual offenses and prisoners whose sexual offenses occurred outside of Massachusetts does not evidence a clear intent to authorize the filing of petitions against prisoners of another state.

The Commonwealth argues that this Court must look at the plain language of

§ 12(b), which requires that a prisoner be serving a sentence but does not expressly restrict petitions to those serving a Massachusetts sentence. See Commonwealth v. Chamberlin, 473 Mass. 653, 660 (2016) (citing general rule that statute should be given effect in accordance with its plain meaning); Commonwealth v. Ferreira, 67 Mass. App. Ct. 109, 113, rev. den., 447 Mass. 1110 (2006) (applying that rule in interpreting G.L. c. 123A, § 12(a)). However, because Chapter 123A is a statute in derogation of liberty, it must be interpreted narrowly. Libby, 472 Mass. at 96; Coffin v. Superintendent, Massachusetts Treatment Cntr., 458 Mass. at 189 (court will not subject class of persons to SDP statute without clear statement of legislative intent to do so). The Commonwealth's interpretation would drastically expand the scope of the SDP statute, implicating due process concerns. Because this Court does not discern a clear indication of legislative intent to reach prisoners of other states, Gardner was not a "prisoner" for purposes of Chapter 123A where he was serving a Rhode Island sentence at the time the Commonwealth filed its petition.

Thus, this Court reluctantly concludes that the June 14, 2017 SDP petition filed against Gardner is invalid.[2] However, in light of the novelty of this legal issue and the palpable threat to

[2]Because the motion can be resolved on grounds of statutory interpretation, this Court need not address Gardner's alternative argument that allowing the Commonwealth to file a petition against him would be fundamentally unfair on the unique facts of this case because the District Attorney sought and procured his transfer to Massachusetts under the New England Interstate Corrections Compact for the sole purpose of filing an SDP petition. See Coffin v. Superintendent, Massachusetts Treatment Cntr., 458 Mass. at 189 (rejecting proposition that Legislature intended G.L. c. 123A, § 12(b) to be triggered by custodial arrangement that should not have been imposed in the first place). Cf. Libby, 472 Mass. at 100 (expressing concern that Commonwealth might delay arraignment or hinder posting of bail to give it time to file SDP petition against defendant detained awaiting trial).

the public from Gardner's release, this Court will stay execution of its order of dismissal to permit the Commonwealth to appeal, should it choose to do so. See Commonwealth v. Gagnon, 439 Mass. 826, 829 (2003) (when allowing motion to dismiss SDP petition, court has discretion to enter stay that results in further detention pending appeal).

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Motion to Dismiss Ch. 123A Petition be **ALLOWED** but this Order is **STAYED** for thirty days to permit an appeal.

November 24, 2017

Mark C. Gildea
Justice of the Superior Court

CERTIFICATE PURSUANT TO MASS. R. APP. P. 16(k)

I, Gail M. McKenna, do hereby certify that the Commonwealth's brief in the case of Commonwealth v. Richard Gardner, Appeals Court No. 2018-P-0012, complies with Mass. R. App. P. 16(k).

Gail M. McKenna
Assistant District Attorney
For the Plymouth District
BBO # 557173

Date: February 12, 2018

CERTIFICATE OF SERVICE

I, Gail M. McKenna, hereby certify that I have this date, February 12, 2018, served a copy of the Commonwealth's brief RE: Commonwealth v. Richard Gardner, Appeals Court No. 2018-P-0012 on counsel for the defendant by mailing to the office of Joseph M. Kenneally, Esquire, P.O. Box 6, Three Rivers, MA 01080 and on counsel for the Department of Corrections by e-filing with Daryl F. Glazer, Esquire.

Signed under the pains and penalties of perjury.

Gail M. McKenna
Assistant District Attorney
For the Plymouth District
BBO # 557173